

*Up. Cole*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Technical Company Inc.

**File:** B-233213.2

**Date:** February 26, 1990

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Donald C. Tolefson, for the protester.  
Barbara C. Coles, Esq., and Christine S. Melody, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

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### DIGEST

1. Protest challenging the award of a contract based on initial proposals is dismissed as untimely where protest is based on information obtained pursuant to a Freedom of Information Act request filed 7 months after the protester first requested information pertaining to the award, since the protester failed to diligently pursue the information forming the basis of its protest.
2. There is no basis for an award of proposal preparation costs where current protest is dismissed as untimely and prior protest under same solicitation by another protester--resulting in a settlement between the parties including in part the agency's reimbursement of the protester's proposal preparation costs--was withdrawn, since a prerequisite to the award of costs under the Competition in Contracting Act of 1984 is a decision on the merits of a protest.

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### DECISION

Technical Company Inc. requests recovery of its proposal preparation costs as a result of the alleged improper award of a contract to InterOcean Systems, Inc., under request for proposals (RFP) No. N00189-88-R-0306, issued by the Navy for the design and manufacture of a camera sled handling system.

We deny the request for costs.

The agency awarded a contract to InterOcean based on its initial proposal on September 7, 1988, and informed all the other offerors of the award on October 7. Craft Machine

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Works, the third-low offeror, protested the award to our Office on October 13; however, Craft subsequently withdrew its protest as a result of a settlement between Craft and the agency, which included in part the Navy's payment of Craft's proposal preparation costs.

According to Technical, it requested information about the award on October 4; however, the Navy's response to its inquiry was vague and unresponsive. Technical claims that it did not learn until late April 1989 that the Navy had reimbursed Craft its proposal preparation costs and that, in its view, the award to InterOcean was improper because (1) InterOcean did not submit a technical proposal with its offer, contrary to the solicitation requirements, and (2) as the second-low offeror, Technical was never afforded the opportunity to negotiate. Technical then filed a Freedom of Information Act (FOIA) request with the agency on May 18.

To the extent that Technical is challenging alleged improprieties in the award of a contract to InterOcean in 1988, we will not consider the merits of its protest since it is clearly untimely. Our Bid Protest Regulations require that protests such as Technical's be filed within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1989). In order to avoid having its protest dismissed as untimely, a protester cannot sit idly by while awaiting information that provides the basis for its protest, but instead must diligently pursue the information within a reasonable time. Atrium Bldg. Partnership--Second Request for Reconsideration, B-228958.3, May 18, 1988, 88-1 CPD ¶ 466.

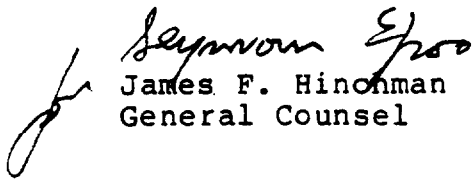
Here, Technical's decision to wait until May 1989 to file a FOIA request with the agency, 7 months after it first requested information from the contracting officer, is not, in our view, consistent with its obligation to diligently pursue information that may form the basis of a protest. Moreover, we see no basis on which to consider the protest under the good cause or significant issue exceptions to our timeliness rules. See 4 C.F.R. § 21.2(b).

Technical also argues that since Craft, the third-low offeror, received its proposal preparation costs, Technical should recover its costs as well. We disagree. Our authority to allow recovery of the costs claimed by Technical is predicated upon a determination by our Office that the solicitation, proposed award or award of a contract does not comply with statute or regulation. 31 U.S.C. § 3554(c)(1) (Supp. IV 1986); Union Natural Gas Co., B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44. A decision on the merits of a protest is an essential condition to a

declaration that the protester is entitled to the award of costs. Rosemount Analytical, Inc., B-235740, Sept. 26, 1989, 89-2 CPD ¶ 273.

Here, we make no such determination with respect to Technical's protest, since it is dismissed as untimely. In contrast, Craft filed a timely protest which ultimately was withdrawn based on a settlement between the parties, which Technical has informed us involved payment of Craft's proposal preparation costs. Since we are not considering Technical's untimely protest on the merits, we will not consider Technical's request for costs.

The request for costs is denied.

  
James F. Hinchman  
General Counsel